UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CONTROLLED ATMOSPHERE PROCESSING, INC.
AND ATMOSPHERE HEAT TREATING, INC.

and Case No. 7-CA-40772

LOCAL 283, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Jerome Schmidt, Esq., for the General Counsel.
John Hancock and Dennis M. Devaney, Esqs.,
for the Respondents.
Michael Finegan, for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. This case was heard in Detroit, Michigan on consecutive days from November 18-23, 1998, following a charge filed by Local 283, International Brotherhood of Teamsters, AFL-CIO (the Union), on March 17, 1998, and amended on May 27, 1998, and issuance of a complaint on June 30, 1998 by the Regional Director for Region 7 of the National Labor Relations Board (the Board).[1]

The complaint alleges that Controlled Atmosphere Processing, Inc. (CAPCO) and Atmosphere Heat Treating, Inc. (AHT), jointly referred to herein as the Respondents, are alter egos and a single employer, and that the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to extend its collective bargaining agreement between CAPCO and the Union to AHT, refusing to recognize and bargain with the Union at the AHT facility, and refusing to comply in a timely manner with the Union's request for relevant information pertaining to the relationship between CAPCO and AHT. It further alleges that the Respondents violated Section 8(a)(3) and (1) by failing and refusing to apply the terms and conditions of CAPCO's agreement with the Union to AHT employees, and by failing and refusing to offer CAPCO unit employees employment at the AHT facility under the same terms and conditions set forth in the collective bargaining agreement between CAPCO and the Union. Finally, the complaint alleges that the Respondents violated Section 8(a)(1) by telling employees it did not want the Union at AHT because it did not want to pay the wages it was paying at CAPCO, that it would not permit the Union to represent employees at AHT, and by soliciting employees to abandon their support for the Union. On July 15, 1998, the Respondents filed an answer denying the alter ego and single employer allegation,[2] and denying that it had violated the Act in any manner.

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[1] Reference to oral testimony provided at the hearing is identified herein by Transcript page number (Tr._). General Counsel exhibits and Respondents exhibits received in evidence are identified respectively as "GCX" and "RX" followed by the exhibit number. Reference to arguments contained in posthearing briefs are identified as "GCB" for the General Counsel's brief, and "RB" for the Respondents' brief, followed by the page number(s).

[2] Notwithstanding the denial in its answer, the Respondents at the start of the hearing

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At the hearing, the parties were afforded full opportunity to call, examine, and cross-examine witnesses, to present relevant oral and written evidence, to argue orally on the record, and to submit posthearing briefs. On the basis of the entire record, including my observation of the demeanor of the witnesses, and after duly considering briefs filed the General Counsel and the Respondents, I make the following[3]

Findings of Fact

I. Jurisdiction

CAPCO, a Michigan corporation, with an office and place of business in Detroit, Michigan, has, at all times material herein, been engaged in the commercial heat treating business. During the calendar year ending December 31, 1997, CAPCO, in the course and conduct of its business operations, had gross revenues in excess of $500,000, and sold and shipped goods and materials to, or performed services valued in excess of $50,000 for, other business enterprises in the State of Michigan, including General Motors Corporation, Chrysler Corporation, and Ford Motor Company, each of which is directly engaged in interstate commerce.

AHT, also a Michigan corporation formed on May 15, 1997 (see GCX-34), maintains an office and place of business in Wixom, Michigan where it has, since commencing operations in early 1998, likewise been engaged in the commercial heat treating business. During the calendar year ending 1998, AHT, in the course and conduct of its operations, was projected to have gross revenues in excess of $500,000, and to sell and ship goods and materials to, or perform services valued in excess of $50,000 for, other business enterprises in the State of Michigan, including General Motors Corporation, each of which is directly engaged in interstate commerce.

The complaint alleges, the Respondents admit, and I find, that at all times material herein, CAPCO and AHT have been and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4] Finally, the Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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entered into a stipulation admitting that at all material times herein CAPCO and AHT have been alter egos and a single employer (Tr. 8). Yet, at times during the hearing, the Respondents appeared to take positions inconsistent with its stipulation (see, e.g., Tr. 109). At no time during the hearing, however, did the Respondents seek to withdraw from the stipulation. If anything, the Respondents on brief appears to have reaffirmed its stipulation that CAPCO and AHT are alter egos by asserting "that the Union knew from the beginning that many of the prerequisites of alter ego status existed" (RB:22-22). The Board has stated that once a stipulation is entered into, it constitutes "a judicial admission of the Respondents' part as to the facts contained therein. Such an admission has the effect of a confessory pleading, and its principal characteristic is that it is conclusive on the party making it." See, *E.G. Sprinkler Corp.*, 300 NLRB 1175, 1178 (1990), quoting from *Academy of Art College*, 241 NLRB 454, 455 (1979).

[3] Appended to the back of the General Counsel's brief is an unopposed motion to correct certain inaccuracies in the record. The motion is granted, and the corrections are hereby incorporated into the record as General Counsel's Exhibit No. 57.

[4] While it apparently ceased operations in June 1998, CAPCO continued to exist as a corporate entity as of the date of the hearing (Tr. 653).

II. Alleged Unfair Labor Practices

A. Factual Background

1. The Respondents' corporate structure and related business enterprises

The record reflects that CAPCO, which began operations in Detroit, Michigan in 1962, has, at all relevant times herein, been wholly owned by Atmosphere Group, Inc.(AGI), a holding company located at 49630 Pontiac Trail, in Wixom, Michigan, and owned by William (Bill) Keough, who holds 88% of AGI's voting stock, and his two children, Scott and Sarah Keough, each of whom owns 6% of the remaining shares in the form of non-voting stock. AGI's Board of Directors includes Bill Keough, Mark Lezotte, John Frost, and Richard Lindgren. CAPCO's Board is made up of three directors: Bill Keough, Lezotte, and Donald Dine, and its management team includes Bill Keough as President (and Chairman), Dine as Treasurer, and Klimko as Secretary. CAPCO's vice-president position was apparently vacant during the relevant time period herein. (GCX-39)

AGI owns three other corporations in addition to CAPCO. Thus, it owns Atmosphere Furnace Corporation, a manufacturer of industrial heating equipment used in the heat treatment process; ATMO, Inc., which is in the automobile and truck leasing business; and Austemper, Inc., which also engages in the heat treating business. Bill Keough and Dine sit on the Board of Directors of all three corporations. Both also serve respectively as president and treasurer of Atmosphere Furnace Corporation and ATMO, Inc.[5] Further, despite its assertion on brief to the contrary, the record makes clear that AHT was wholly owned by AGI for a period of seven months from the date it was incorporated in May 1997, holding all 1000 shares of the issued stock.[6] In January 1998, AGI sold all 1000 shares of its AHT stock to the Keough children, Haase, and James, with the Keough children each receiving 450 shares, and Haase and James receiving 50 shares each. Thus, it would appear that when incorporated and thus first formed in May 1997, ownership in AHT was indirectly in the hands of Bill Keough as well as the Keough children by virtue of their respective majority and minority ownership in AGI.

The record also reflects that Bill Keough owns yet another corporation, Cranbrook Investments, which leases equipment to various entities, including CAPCO and AHT. He and Dine are the sole directors of the corporation, with Dine also serving as treasurer (Tr. 614). Dine testified that around December 1996, another company, Keough Family Limited

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[5] One Chitranjan Gupta also serves on Atmosphere Furnace's Board of Directors, along with Bill Keough and Dine and further serves as its vice-president. Austemper's president is one Lee Price. Price also sits on Austemper's Board of Directors, along with Bill Keough and Dine. Klimco serves as ATMO's secretary.

[6] Thus, GCX-31 and GCX-20 show that AGI at all times prior to January 1, 1998, was AHT's sole shareholder, owning 1000 shares of stock, and that it was solely responsible for selecting its Board of Directors. There is some unexplained discrepancy, however, between GCX-31 and GCX-20, for while the latter reflects that AGI selected Bill Keough, Haase, James, and Dine as AHT directors on September 25, 1997, the former document, executed more than four months earlier on May 15, 1997, shows Bill Keough, Haase, James, and Dine already serving as AHT Board directors and approving AGI's purchase of 1,000 shares of AHT stock. Notwithstanding this discrepancy, there can be no disputing that AGI was sole owner of AHT. The Respondents are therefore not being entirely candid when they assert on p. 8, fn. 5 of their brief that "unlike CAPCO and Keough's other companies, AHT was not owned by" AGI.

Partnership, was created for estate planning purposes and for investment in property and equipment to be leased out.[7] Each of the Keough children received 49% ownership interest in the Partnership, and Bill Keough received the remaining 1%.

CAPCO has, for years, maintained a collective bargaining relationship and been party to successive agreements with the Union which represented all of its "operators, maintenance helpers, truck drivers and hi-lo drivers" employed at the Detroit facility, the most recent of which expired by its terms on March 26, 1997. In late 1996, according to Respondents, it decided to close CAPCO and to open a new heat treating facility, AHT, at a different location. The Respondents explained that it decided to close CAPCO because it had antiquated equipment, was "landlocked" in the sense that it could not be expanded and thus had limited or no growth potential, and was situated in a high crime area which had led to numerous incidents and which caused its customers not to want to visit or do business at that facility.

2. The 1997 negotiations

In early 1997, CAPCO and the Union began negotiations for a new contract. Talks began on February 27, with additional meetings held on March 24, and March 26, 1997. While there is no disputing that the focal point of those negotiations centered on Respondents' decision to close CAPCO and to open a new heat treating plant, AHT, at a different location, the parties, as will be shown below, disagree on what was said by Respondents' negotiators (Haase, their attorney, John P. Hancock, Jr., and assistant plant manager Ed Small) to the Union's negotiators (Union Vice-President and Business Agent, Michael Finegan, Union steward Jerry Hobson, and Alternate Steward, Brian Bothwell) regarding the closing of CAPCO and opening of AHT. At one point in the negotiations, the parties, anticipating that additional bargaining time might be needed following expiration of its existing contract, entered into a "Memorandum of Understanding" in which they agreed to forego a strike or lockout for a 30-day period following the contract's expiration (RX-1).[8] The parties in fact reached agreement soon

[7] Dine's testimony as to when the Partnership was formed is somewhat confusing, for he in fact testified that "it was created in January of '96; or right around December, January of '96." (Tr. 654). Thus, it is unclear if Dine meant to say December 1996 or January 1997. Dine also provided confusing testimony on when the decision was made to have ownership in AHT transferred to the Keough children. For example, during questioning by Respondents' counsel, Dine testified:

> "Okay, when we were doing estate planning for the Keoughs, the family limited partnership was formed and assets were transferred and the building was purchased by the partnership. …At the same time, we became aware of an opportunity to put [AHT] transferring by sale to the [Keough children] at the value of the stock…." (Tr. 632).

His above testimony can be read to suggest that the Respondents was planning, or had decided, to transfer ownership of AHT to the Keough children at the same time the Partnership was formed, which, according to Dine, occurred in December 1996. However, when cross-examined regarding the time sequence, Dine testified that the tax planning and decision to transfer ownership to the Keough children occurred in December 1997 (Tr. 654).

[8] The Memorandum of Understanding was signed by Haase on March 17, 1997, and faxed to Finnegan for signature, which the latter did on March 20, 1997. Of relevance to this proceeding is language contained in the second paragraph of the agreement stating that the additional bargaining time was needed to "address issues of effects bargaining related to the Company's intention to relocate operations for entrepreneurial reasons." Finnegan testified that in signing the Memorandum, he paid little attention to the document and did not read the top

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thereafter on the terms of a new three-year contract, effective from March 27, 1997 to March 26, 1990, that incorporated, among other things, a "Letter of Understanding (#2)" addressing the subject of plant closure and the benefits to be provided to CAPCO's unit employees stemming from CAPCO's closing. The Letter of Understanding concludes by stating that "the Employer will not be required to bargain any further on the issue of a plant closing or its effect" (GCX-5, p. 29).[9]

What was said to the Union by Respondents' negotiators is, as noted, disputed by the parties. The Union, for its part, claims that Company negotiators misrepresented the true nature of the relationship between CAPCO and AHT by leading it believe that CAPCO was going completely out of business and that AHT was to be a separate and distinct entity operating at a different location, under different ownership, a different employee and supervisory complement, and different equipment. The Respondents, on the other hand, contend that the Union was told that CAPCO was relocating its operations to AHT. Thus, they argue on brief that the "Union was fully aware that for entrepreneurial reasons, CAPCO was being closed and then reopened as a new business," and that the Union, based on what it was told during those negotiations, knew that CAPCO was merely relocating its operations and that AHT was to be the alter ego of CAPCO (RB:22-23).

Called as a witness by the General Counsel, Finegan testified that for some time prior to the 1997 negotiations, he had been hearing rumors from Union stewards that CAPCO intended to "change locations," and had in fact learned that a new building was being built which he believed was to be CAPCO's new location. Relying on that information, Finegan prepared an initial proposal which he submitted to the Respondents at the start of the 1997 negotiations containing language addressing any such relocation.[10] The proposal provided, inter alia, that if CAPCO were to relocate its operations elsewhere, the Union intended to "follow the work." Finegan testified that on presenting his proposal at the first meeting, he was told that CAPCO was planning to close down operations and go out of the heat treating business, and that a new and completely different company was to be formed which would operate completely different from how CAPCO had operated, with all new equipment and wholly different customers, and would have "absolutely no affiliation whatsoever with CAPCO." He testified that at no time was the term "relocation" used by Respondents' negotiators to describe CAPCO's closure. Finegan claims that when he asked about the new building being constructed, he was told that CAPCO

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portion containing the above quoted statement on relocating "for entrepreneurial reasons." He explained that the discussions which gave rise to this Memorandum only focused on the need to obtain additional time for bargaining so that when he received the Memorandum he signed it believing it was in accord with the parties intent to extend bargaining for thirty days, and paid no attention to the quoted language (Tr. 255-257). I found his explanation plausible.

[9] The contract also contains a provision entitled "Transfer of Company Title or Interest". That provision, contained in Article III, in part, reads as follows:

> "This agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof."

[10] See, GCX-13. Item 10 of the proposal lists the subjects the Union wanted discussed, including a proposal that should CAPCO move more than 25 miles from its current location, employees would be compensated for the extra drive time. The Respondents submitted their own typewritten proposal at the March 24, session (GCX-43).

had nothing to do with the building and that the latter was being created as a trust for the Keough children. (Tr. 154-156). Haase and Small both testified at the hearing. However, they were never asked to confirm or deny Finegan's assertion that construction of the new building at Wixom and the creation of a trust fund for the children had been discussed at this first meeting. I therefore credit Finegan and find that both topics were the subject of some conversation at this first bargaining session.[11]

Regarding ownership of AHT, Finegan testified that Hancock gave him two different stories, stating at first that "no portion of the new company" would be owned by anybody affiliated with CAPCO, but then asserting that Bill Keough "would own a minority portion of the new business" (Tr. 321). Finegan claims he was also told the new company would have a different supervisory staff and different customer base, and that none of CAPCO's current supervisors, employees (both union and nonunion alike), and equipment would be going over to the new facility. Haase, Finegan testified, also stated that he himself did not have a job at the new AHT facility. According to Finegan, either Hancock or Haase assured him during the first or second bargaining session that there was no connection between AHT and CAPCO. Asked if the Respondents gave the Union reasons for closing CAPCO, Finegan replied that he and the other Union negotiators were simply told that CAPCO was going completely out of business, and was unable to recall if Respondents offered anything more in the way of an explanation. Thus, he did not recall the Respondents citing during those negotiations the unsafe character of the neighborhood, equipment obsolescence, inability to expand, and refusal by CAPCO customers to visit the CAPCO plant as reasons for the decision to close CAPCO. He did, however, recall some mention being made during the negotiations of dead bodies being found in the CAPCO parking lot and of the Detroit police's lack of responsiveness to such incidents.

Finegan testified that after the first meeting, he became concerned that CAPCO might not be closing down completely and, consequently, drafted a proposal which he presented to the Respondents at the March 24, meeting entitled "PLANT CLOSING/RELOCATION", which which drew a distinction between a "plant closing" and "relocation," and set forth the rights and obligations of the parties in the event either a "plant closing" or a "relocation".were to occur.[12]

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[11] In light of Finegan's undisputed and credited testimony, I find it difficult to believe the Respondents claim on brief that when the parties began negotiations in February 1997, the Respondents "did not yet have any finalized plans" regarding AHT and "had not even settled on a location." (RB:3). Rather, I am convinced from Finegan's testimony that the Respondents were in fact in the construction phase of the new facility when the negotiations got under way, and knew precisely where AHT would be located. The position statement submitted by the Respondents to the Board in April 1998 (GCX-12) appears to bolster Finegan's testimony in this regard and to undercut the Respondents' claim that plans for the AHT facility, including its location, had not yet been finalized in February 1997. Thus, the Respondent states in its position statement that "[w]hen the Company began negotiations for the current contract…," which occurred in February 1997, "[t]he Union was informed that some of the Company's owners would be joining with additional (new) owners to set up a separately incorporated company, Atmosphere Heat Treating, with a new facility and new equipment, and using a new treating process than the one used by Controlled Atmosphere," and that "the facility would be in Wixom, Michigan." The above language thus makes clear that the Respondents knew full well when they met with the Union in February 1997 just where the facility would be located, as implicitly suggested by Finegan's testimony.

[12] See, RX-2. The proposal defined a "plant closing" as occurring "when all operations and work cease to exist," and a "relocation" as occurring "when all operations cease at this current location and restarts at a new location [within 100 air miles of the closed location] whereas the

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After Finegan explained the proposal, the Respondents, according to Finegan, assured him that CAPCO was not relocating but rather going out of business and closing the building and business entirely, and that the relocation language in the proposal was therefore not needed. Finegan claims the Respondents reiterated that AHT was to be a new facility under new ownership, at a different location, utilizing a new heat treating process with new equipment. Finegan testified that based on Hancock's assurance that CAPCO was not relocating, the Union withdrew its relocation proposal and did not pursue the question of transfer rights for CAPCO employees to AHT. (Tr. 155-156, 236-247, 250, 253).

Much of Finegan's testimony as to what was told the Union during the 1997 negotiations regarding CAPCO and AHT was corroborated by Bothwell and Hobson. Hobson testified that at the first meeting, the Union was informed that CAPCO was closing down and that a new plant was to be opened with "new employees, new equipment, and new owners." As to why CAPCO was closing, Hobson recalls that Respondents made reference to the fact that the building was too old to fix up and mentioned something about "the equipment and stuff," and that the reasons for the closure related "mostly" to problems CAPCO was having having with the building. Hobson further recalled that after informing the Union about their decision to close CAPCO, the Respondents' asked the Union to come back with a proposal on the CAPCO closure. The Union, Hobson claims, returned the next meeting with the Plant Closing/Relocation" proposal and explained to the Respondentds that if CAPCO intended to relocate and not close down, it wanted the CAPCO contract made applicable at the new facility. Hobson testified that the Union finally agreed to sign the plant closing agreement, rather than a relocation agreement, based on the Respondents' assurance that CAPCO was not relocating its operations and was instead closing down completely.(Tr. 556-557, 572).

Bothwell recalled the first meeting was a relatively short one, lasting some 20 minutes, that at that meeting Hancock told them CAPCO would be closing within a year, that Bill Keough was getting out of the heat treating business, and that while a site for AHT had not yet been selected, the new plant would have new owners and investors and would be in the heat treating business, but in an upgraded form (Tr. 360). At the second meeting, Hancock, Bothwell recalls, reiterated that Bill Keough was closing the CAPCO plant and going out of business, and would be having nothing to do with AHT (Tr. 391, 394, 518).[13] Bothwell further recalls that he and Finegan then asked Hancock and his fellow negotiators numerous questions regarding the closing, including what would happen to CAPCO's employees once the plant closed. Haase, Bothwell claims, stated that all CAPCO employees, both salaried and Union-represented, were to be laid off and out of work, that "no one," including supervisors was going over to the new facility, and that he himself was not certain if he would have a job with AHT. (Tr. 466, 487, 519).

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nature of the work performed is similar to the work currently being performed by bargaining unit employees, and or the company retains all or part of the same customer base it had prior to relocation, and or the current owner retains full or part ownership of the company."

[13] Hancock did not testify, and neither Haase nor Small, both of whom were present during these negotiations, specifically refuted Bothwell's assertion as to what Hancock may have said at these meetings. Accordingly, I credit Bothwell and find that Hancock made the remarks attributed to him by Bothwell. Bothwell, it should be noted, also testified that Respondents' negotiators initially stated during the 1997 negotiations that "Bill [Keough] wasn't going to have nothing to do with [AHT]," but subsequently admitted that Bill Keough "would have something to do with the new company" (Tr. 394) His testimony in this regard, contrary to the Respondent's assertion on brief, corroborates Finegan's claim that the Respondents at first denied that Bill Keough would be involved with AHT, and subsequently agreed Bill Keough "would own a minority portion of the new business" (Tr. 321).

Bothwell recalls the Respondents giving two reasons for wanting to close down CAPCO: it was having with a local water company and because some of its truck drivers had been robbed. He denied, however, hearing Respondents' negotiators mention anything about CAPCO's inability to expand operations at that location, or its purported antiquated equipment, as reasons for closing down CAPCO. In fact, Bothwell testified that CAPCO had put in a new furnace (No. 11) just one year earlier. (Tr. 511-513) Bothwell insists that the Respondents repeated the theme that CAPCO was not relocating and was simply going out of business completely, and that the Union's efforts to get the Respondents to sign a relocation agreement granting the Union recognition at the new facility was repeatedly rejected by Respondents on grounds that the action being taken was a closure and not a relocation of CAPCO (Tr. 517-518)

Haase, like Bothwell, testified that the first meeting was a rather short one, and that the Union was informed at this first meeting that CAPCO was closing down, that a new plant was to be opened in "a western suburb," and that the Respondents wanted to negotiate a one year plant closing agreement. While he recalled the Union asking about the ownership of the new facility, Haase was uncertain if the issue of ownership of the new facility was ever discussed. Thus, he at first testified that he was unsure if any such discussion took place, but subsequently admitted that the Union may have been told that the new company (AHT) was to be under an "entirely new ownership." (Tr. 122, 139). He did recall the parties discussing Respondents' reasons for closing CAPCO, whether CAPCO employees would be going over to the new facility, and whether the contract would cover the new plant. Haase claims the Union was told that CAPCO employees would not be going to the new facility, and further claims that the Union never asked if CAPCO's supervisors would be transferring to the new plant. According to Haase, Finegan agreed with the Respondents' negotiators that any contract entered into between the parties would terminate with the closing of CAPCO and not extend to the new facility.

As to the meeting in which Finegan presented the Union's "Plant Closing/Relocation" proposal, Haase agrees seeing and discussing the proposal, and acknowledges that the proposal was intended to present the Respondents with two distinct options depending on whether it was permanently closing CAPCO and going out of business, or merely relocating its operations elsewhere. Thus, the Union proposed that if CAPCO were indeed closing down entirely (and not simply relocating operations elsewhere), unit employees would be given a severance package; but that if CAPCO was in fact relocating to another site (as opposed to closing down and going out of business entirely), unit employees would be allowed to transfer to the new facility (Tr. 130-131). According to Haase, the Respondents' negotiators responded to the proposal by stating that because CAPCO was closing down and not relocating, there was no need for the parties to negotiate, and enter into, a "plant relocation" agreement.

Haase's testimony as to what the Union was told regarding the relationship between CAPCO and AHT is confusing and self-contradictory. For example, he, as noted, admits that in response to the Union's "Plant Closing/Relocation" proposal, the Respondents assured the Union that the "plant relocation" agreement was not needed as CAPCO had no intentions of relocating to Wixom. He further concedes that the Union entered into the plant closing agreement in reliance on that representation. Haase also recalls telling the Union at this meeting that AHT was to be a new facility with all new equipment, and a new process, and would be operating from a different location, and testified that "the company had always been telling [the Union] that [AHT] was going to be a new employer" and, by inference therefore, not a continuation of CAPCO (Tr. 134-136).

Yet, elsewhere in his testimony, Haase claims that the Union was told that CAPCO was

"closing the plant and moving to another location." (Tr. 122). Further, when asked about the Memorandum of Understanding signed by Haase and Finegan extending the contract talks for 30 days beyond the contract's expiration date, Haase claims that the language therein referring to "relocation for entrepreneurial reasons" was fully discussed by the parties during negotiations and that the Union, in his view, understood this to be the reason why the parties agreed to the 30-day extension (Tr. 128).[14] These latter claims by Haase are facially inconsistent with his own previously-described admissions that AHT was to be a new employer distinct from CAPCO. They also contradict his further testimony that when Finegan expressed concern on several occasions that "AHT might actually be the same employer as CAPCO," he and the other Company negotiators assured him this was not the case (Tr. 144).

Haase, as noted, was also unclear on the ownership of AHT was ever discussed with the Union, although he did recall the Union asking about it (Tr. 122, 139). He also recalled the Union asking to have the CAPCO bargaining unit transferred to AHT and the Respondents refusing to do so. While he admits that the Union asked the Respondents to explain their denial, Haase provided no clear answer on how the Respondents replied to the Union's inquiry, and testified only that "we went back and forth" on the issue. Finally, while Haase recalled discussing the reasons for CAPCO's closing, he was never asked at the hearing to state what those reasons were.

At the third meeting, Hancock, according to Bothwell, proposed a one-year plant closing agreement which would have included a buyout provision for employees. The Union, however, insisted on a three-year contract because, according to Bothwell, of the Respondents' expression of uncertainty during the negotiations as to when CAPCO would be closing, or when the new facility might be opening. (Tr. 391-395, 397) The parties, as noted, eventually reached agreement on a three year contract which, as noted, incorporated a plant closing "Letter of Understanding."

3. AHT's incorporation

On May 15, 1997, less than two months after the parties concluded negotiations on a new contract, Articles of Incorporation for AHT were filed with the State of Michigan listing Bill Keough, Haase, James, and Dine as its corporate directors. AHT's "registered office" is listed in the Articles of Incorporation as "49630 Pontiac Trail, Wixom, Michigan", the same address as AGI, and Bill Keough is named as AHT's resident agent at that office.[15] (GCX-34; 55[b], item 10). That same day, AHT's Board appointed Bill Keough as Chairman, Haase as President, James as Vice-President, Dine as Treasurer, and Klimko as Secretary of the new corporation. As noted, Bill Keough, Dine, and Klimko also served respectively as Chairman, Treasurer, and Secretary of CAPCO. Also that day, AHT's Board, as previously indicated, authorized the

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[14] Haase was unclear on the specifics surrounding the signing of the Memorandum. Asked, for example, when the relocation language contained therein was discussed, Haase first stated, "Maybe at the first meeting," then added, "after the first meeting." Haase was also unable to recall being present when Finegan signed the Memorandum of Understanding, and consequently, could not have known what might have been discussed between Finegan and Hancock as to the relocation language, or whether Finegan read the document before signing it. His sketchy testimony regarding the signing and discussion of the Memorandum is therefore rejected as not reliable.

[15] In response to an information request from the General Counsel for a list of all business addresses used by AHT between May 15, 1997 and July 1, 1998, the Respondents listed Atmosphere Group's "49630 Pontiac Trail" address, as well as "30760 Century Drive" in Wixom.

purchase and sale of 1,000 shares of AHT stock to Atmosphere Group at a cost of $1.00 per share. (GCX-31).

Testimony at the hearing and/or information provided by the Respondents pursuant to subpoena revealed, among other things, that from May 15, 1997, when it was first incorporated, through July 1, 1998 (one month after CAPCO's closing), AHT and CAPCO: used the same certified public accountants (KPMG Peat Marwick) to handle their accounting matters; the same law firm (Butzel, Long) to handle legal and labor relations matters; maintained their accounting records at the same "49630 Pontiac Trail" location in Wixom, Michigan; banked at the same financial institution (Comerica Bank) but held separate accounts; utilized the same employee life and health insurance company (Guardian Insurance) and workman's compensation company (Amerinsure) and, indeed, had their employees covered by the same life, health, and workman's compensation policies (life/health insurance policy number 300872; workman's compensation policy number WC0761226).[16]

On July 31, 1997, AHT Directors Haase, James, Dine, and Keough executed a consent agreement authorizing AHT to lease from Keough Limited Partnership a facility to be constructed by the latter, along with equipment and other personal property which AHT would need in the conduct of its operations (GCX-27), and on August 1, 1997, AHT entered into a ten year agreement to lease property owned by the Limited Partnership, presumably located at the 30760 Century Drive address. The agreement was signed by Bill Keough on behalf of the Limited Partnership, and by Dine on behalf of AHT.

On September 25, 1997, Bill Keough, Dine, Haase, and James were elected by Atmosphere Group as members of AHT's board of directors. That same day, the AHT board of directors elected Bill Keough as AHT's Chairman, Haase as President, James as Vice-President, Dine as Treasurer, and Klimko as Secretary. (GCX-20). On January 1, 1998, Atmosphere Group sold its 1000 shares of AHT stock to Scott and Sara Keough, each receiving 450 shares, and to Haase and James, each of whom received 50 shares.

4. Events following the 1997 negotiations

By December 1997, according to Haase, he, Keough, and James began formulating plans for staffing the AHT facility and, with this in mind, asked all CAPCO nonunion people, both supervisory and nonsupervisory, to fill out job applications to see who wanted to go.[17] After the completed job applications were turned in, Haase, Keough and James got together informally and decided which employees to hire. With the exception of two individuals (Small and janitor Jerry Finley), all the nonunion employees were hired at AHT and given assurances that they would be receiving a compensation and benefits package comparable to what CAPCO had been paying (Tr. 697).

[16] Compare, GCX-54 and GCX-55.

[17] Haase's further testimony during questioning by me, that he only distributed the job applications after the nonunion employees began asking for them, is simply not credible particularly in light of his prior testimony that he distributed the applications in order to see who might want to go to AHT. CAPCO's Union-represented employees were not afforded the same opportunity as nonunion employees, for Haase readily admits that job applications were not distributed to bargaining unit employees, and that the Union was told at a subsequent meeting, when it asked for job applications, that unit employees would have to go to AHT and apply in person. (Tr. 702)

In late November or early December, 1997, Bothwell asked Haase when CAPCO would be closing, and when Haase declined to give him an answer, Bothwell asked if Bill Keough was going to have anything to do with the new AHT facility. Haase, according to Bothwell, replied that Bill Keough was making all the decisions, a clear reference, I find, to the fact that Bill Keough was making all decisions regarding CAPCO's closure and AHT's opening. When Bothwell pointed out that this was contrary to what the Union had been told during the 1997 contract talks, Haase stated that he, Haase, had not been doing the talking for the Company during the negotiations. Bothwell then asked Haase if Keough was just trying to "bust up" the Union, and Haase responded that Bill Keough "should be able to do what he wants with his own equipment, and no one should be able to tell him what to do with his equipment," that if Keough "doesn't want to take the Union, he doesn't have to." Bothwell further recalls asking Haase what CAPCO intended to do with its salaried employees. Haase replied, "Whoever wants to go, can go; whoever wants a buyout will get a buyout," adding that he too was going over to the new facility. (Tr. 397-399) The record indeed reflects that except for two individuals (Small and Jerry Finley), CAPCO's entire supervisory/managerial staff transferred to AHT.[18]

Bothwell also testified to having a conversation with Small at the CAPCO shop at around the same time regarding the AHT facility. According to Bothwell, Small commented that Bill Keough "can pick up and do what he wants to do," that he, Bill Keough, was not going to pay the "type of money that he's paying at CAPCO out at AHT when he can hire temporaries to do the work," and that "the Union wasn't going to go [to AHT] no matter what we did." (Tr. 424) Small denied making any such comments to Bothwell. (Tr. 424; 541)[19]

Haase admits that he and Bothwell often spoke about the CAPCO closing in late 1997, and while he initially denied ever having a "union busting" conversation with Bothwell, Haase eventually admitted to having had several such discussions on being confronted with an affidavit he gave to the Board contradicting his testimonial denial. Haase claims that it was in the context of responding to Bothwell's "union busting" accusations that he expressed the view that

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[18] GCX-53 thus reflects that from October 1, through December 31, 1997, CAPCO's supervisory/managerial staff consisted of four supervisors (Christopher Gilday, Gary Lozano, Stephen Swoffer, Marvin Williams), two maintenance managers (George Anderson, Murray Young), one office manager (Charlene Dalton), one quality assurance manager (Sam Domke), one plant service manager (Small), one Janitorial service manager (Jerry Finley), and one General Manager, Haase. GCX- 55(b), at item 12, lists AHT's supervisors and managers and reflects that Lozano, Swoffer, and Williams are employed as supervisors, Anderson and Young as maintenance managers, Dalton as office manager, Domke as Quality Assurance manager, and Haase as president of AHT. Small, for reasons not made clear in this record, was not offered employment at AHT. However, he subsequently began his own independent trucking business and is working as a contract driver for AHT (Tr. 549-551). Finley, CAPCO's Janitorial Service department manager, opted to retire rather than transfer. The only other management individual listed in GCX-55(b) but not shown on GCX-53 as having previously been employed by CAPCO in a similar capacity is Wallace James, who assumed the position of AHT vice-president. The Respondents, however, admit that James was a former CAPCO manager (RB:7).

[19] In an affidavit he gave the Board in April 1998, Bothwell placed this conversation as occurring in early February 1998. (see GCX-10, attachment 7, p. 8). Notwithstanding this discrepancy and any other minor variations that might exist between Bothwell's testimonial version of this conversation and that contained in his affidavit, I credit his account and find that Small indeed made the remarks attributed to him by Bothwell. I found Bothwell to be a generally credible witness. Small, on the other hand, was not very convincing in his denial.

"an entrepreneur should be able to do what he wishes with his property." Haase, however, never denied saying to Bothwell that Bill Keough was making all the decisions regarding CAPCO and AHT. I therefore I credit Bothwell and find that Haase indeed admitted that Bill Keough was in charge of what was happening at both locations.

Bothwell told Finegan of his conversation with Haase, and expressed to him his belief that the Respondents had not been candid with the Union during the last contract negotiations regarding the true nature of the CAPCO closing and of Keough's involvement with AHT. Finegan confirms having spoken with Bothwell, and testified that either in December 1997 or January 1998 he also learned that the Respondents were dismantling CAPCO equipment and transferring it elsewhere, and that CAPCO's maintenance staff was no longer being paid by CAPCO and was instead being paid by AHT (Tr. 172-173).[20] In response to that information, Finegan sent Respondents a letter on December 12, 1997, stating his belief that the conditions under which the plant closing agreement was negotiated had either changed or been misrepresented to the Union during negotiations, and requesting a meeting to discuss the matter (GCX-2). The record reflects that the parties in fact held several meetings in early 1998.

5. The 1998 meeting and related events

The first such meeting in 1998 was held on January 16, to discuss a grievance filed by the Union alleging a violation of Article III of the parties' agreement regarding the transfer of CAPCO property to AHT.[21] In attendance was Finegan, Bothwell, and Hobson for the Union and Hancock, Haase, and Small for the Respondents. Finegan recalls taking the position at that meeting that the closing agreement entered into during the last negotiations was void because of the misrepresentations made to the Union by CAPCO's negotiators as to the true nature of the relationship between CAPCO and AHT (Tr. 165). He testified that Hancock and Haase both denied that CAPCO had any ownership in AHT, but did admit later in the meeting that Bill Keough had a minority ownership in AHT. At one point in the meeting Haase, Finegan claims, mentioned that AHT had been established by Bill Keough as a trust fund for the Keough children (Tr. 230-231). Haase recalls having made this latter statement, but had difficulty explaining how the subject of the trust fund came up. Thus, he could not recall if he made the comment in response to questions posed by the Union regarding ownership of AHT. Asked at the hearing how he happened to learn of the creation of the trust fund, Haase explained he received the information through a "word of mouth" conversation he had had either with Dine or Bill Keough (Tr. 78-79). Haase claims that despite asserting that Respondents had misrepresented the facts to the Union during the prior negotiations, the Union never responded to Respondents' numerous requests to identify what those misrepresentations were (Tr.119).

Bothwell confirmed much of Finegan's testimony regarding the January 1998 meeting. He recalls that it was at this meeting that the Union was first given the name of the new company and told it was to be located in Wixom (Tr. 407). At this meeting, according to

[20] The record in fact reflects that on December 30, 1997, Haase, as president of AHT, signed a lease agreement with CAPCO whereby the latter agreed "to pay full costs plus 5% for leasing certain employees" of AHT from January 1, 1998 through the closing of CAPCO (GCX-39, Tr. 102).

[21] See, GCX-3. The February 29, 1998, date shown on the grievance as the filing date is obviously in error, as made clear by the testimony of the various witnesses who testified that the grievance was discussed during the January 16, meeting. No explanation was offered for the erroneous date shown therein. The remedial relief sought by the Union under the grievance was "to have the existing union workforce follow the work and business to the new location."

Bothwell, Hancock informed the Union that Bill Keough would have "something to do" with AHT. Bothwell further recalled that during this meeting, he questioned Hancock about the furnaces at CAPCO, and was told that two such furnaces, a No. 8 furnace owned by CAPCO, and a No. 11 furnace being leased to CAPCO, presumably through Cranbrook Investments, would be going over to AHT. On January 28, 1998, Finegan gave Haase notice of the Union's desire to negotiate changes or revisions to the "wages" provision and related health insurance matters contained in Schedule A of the CAPCO agreement.

The parties met again on February 13, 1998. At this meeting, Respondents' negotiators, according to Finegan, reiterated that CAPCO was going out of business, and denied having made any misrepresentations to the Union regarding the closure. Finegan recalled the Respondents provided the Union with a timetable for when employees would be receiving their severance checks, and offered to increase the severance package by $500, subsequently increased to $1000 by the end of the meeting, if the Union would agree to terminate the collective bargaining agreement (Tr. 205-206). The Respondents further explained to the Union that it intended to auction off CAPCO's equipment. When asked by the Union if the equipment was to be repurchased under AHT's name, Hancock answered that that possibility could not be ruled out (Tr. 206). Hancock's reply, Finegan explained, threw up a "red flag" because while assuring the Union that CAPCO was going out of business and that its equipment was to be auctioned off, Hancock's admission that CAPCO's equipment might still be bought back implicitly suggested the Respondents may not in fact be closing CAPCO down completely, as asserted by Hancock (Tr. 207) Finegan recalls that possibly at this meeting, he was shown a copy of a check for $300,000 reflecting the sale of CAPCO's No. 11 furnace to AHT.

On February 23, 1998, Haase wrote Finegan to confirm what had been discussed at the February 13, meeting, and to respond to the Union's grievance (GCX-17). The letter states, among other things, that CAPCO "is going out of business on or about March 31, 1998," and that it had not transferred "any of its operations" to AHT, as asserted in the grievance. Haase further notes in his letter that CAPCO had "sold individual pieces of equipment to other companies as it liquidates its assets" and "had gotten out of a lease agreement for one of its furnaces," and that the remainder of its equipment was to be sold at auction at some future unspecified date. Haase denies in the letter that CAPCO was in violation of its collective bargaining agreement and reiterated that CAPCO was "simply going out of business." Finally, Haase states that while the Respondents were adhering to the terms of the plant closing agreement executed by the parties during the 1997 negotiations, in the interest of resolving the matter, the Respondents were willing, in exchange for terminating the contract as of February 28, 1998, to "pay to each employee on the payroll as of February 9, 1998, One Thousand Dollars ($1000.00) including those who have resigned prior to February 28, 1998."

In apparent response to, and rejection of, Haase's February 23, letter, Finegan on March 6, wrote to Haase reiterating the Union's demand, as per the grievance, for recognition at AHT, reasserting the Union's position that "at negotiations one year ago, the Company misrepresented the facts to the bargaining committee by stating and securing a letter of understanding through fraud," and requesting that Haase provide him with certain information pertaining to CAPCO and AHT.[22] On March 9, Finegan asked Bothwell to get the names of the

[22] See GCX-7. The information requested was obviously being sought in connection with the Union's claim that CAPCO was in breach of Article III of their agreement, and, as evident by the wording of the request, for purposes of determining if AHT was nothing more than an alter ego of CAPCO. The information sought by the Union included:

- All names affiliated with ownership, shareholders, officers, trustees.

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employees who wanted to go to the new facility. In response thereto, Bothwell prepared a document stating that the undersigned employees "want to continue working…and want to work at the Wixom plant." Bothwell signed it himself, and got employees Golden and Sharp, the only other two employees working at the time, to sign it also (GCX-19).

The parties met again on March 9. In attendance were Hancock, Haase, Small, Finegan, and Bothwell. During the meeting, the parties discussed what was occurring at AHT and the prospects of having current employees hired at that facility (Tr. 174, 176).[23] Finegan testified, without contradiction, that the Respondents offered to give CAPCO employees preferential hiring rights at AHT but only if the Union agreed to terminate its collective bargaining agreement with CAPCO, an offer rejected by the Union. At this meeting, Bothwell expressed a desire to go to the new facility, but was told that Respondents had already negotiated a severance package and intended to adhere to the severance agreement. Haase admits that Bothwell asked about employment at AHT, and recalls telling Bothwell that "his attendance record probably would preclude him from future employment" (Tr. 47).[24]

At some point during this meeting, the Union asked the Respondents for AHT job

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- A complete list of customers, suppliers, vendors, outside contractors, including a copy of any agreements between the parties.
- Any correspondence sent to customers, suppliers, venders (sic), outside contractors advising them of the closing or relocation of Controlled Atmosphere.
- Any and all lease agreements on all property, equipment or manpower.
- Copy of any and all receipts from the sale, auction, leasing, or donating of equipment or property.
- A copy of all advertising of property or equipment for sale or lease, including real estate agents, brokers and newspaper ads.
- A list of all employees employed at Controlled Atmosphere within the last 60 days and a list of all the current and anticipated employees of Atmosphere Heat Treat.
- Copy of the Article of Incorporation and related documents.
- Any documents filed with any governmental agency requesting dissolution or name change for Controlled Atmosphere.
- Any applications for credit, loans or other financing and/or agreements related to the relocation of work from Detroit to Wixom or the creation of Atmosphere Heat Treat, where the application or agreement involves Controlled Atmosphere or Atmosphere Heat Treat, and/or which is signed by or guaranteed by any current or former officers, shareholders, and/or owners of any interest in Controlled Atmosphere.

[23] Finegan testified, without contradiction, that the Friday before the March 9, meeting, he received a call from Hancock stating that Respondents intended to sweeten the severance package for CAPCO unit employees an additional $2500. over and above the $1000. that had previously been agreed to by the parties. During that phone conversation, Hancock, according to Finegan, suggested that they stage a fake argument at the upcoming meeting during which Finnegan would "rant and rave a little bit" and then leave the room. On his return, the Respondents would then offer the $2500. increase in the severance package which would make Finegan look like a hero in front of the other Union members (Tr. 176).

[24] Haase's testimony was somewhat confusing in this regard, for despite having told Bothwell that he might be precluded from being hired due to a poor attendance record, Haase claims he also told Bothwell to come out to AHT so that he (Haase) could show Bothwell around the facility. When asked if he would have hired Bothwell if he had gone to visit AHT as suggested by Haase, the latter stated, "I'm not sure, I may have" hired him (Tr. 46).

applications to give to its members, but Respondents claimed that they had none. The Union then gave Respondents the letter signed by Bothwell, Golden, and Sharp, and asked the Respondents to treat the letter as a job application on behalf of the three named employees since each had signed a release of information. The Respondents, however, declined to do so claiming that "they couldn't release information from one company to another." (Tr. 182)

The parties did engage in some discussion on the possible placement of CAPCO employees on a preferential hiring list based on prior performance, attendance, disciplinary history, and status, but without a grant of recognition to the Union (Tr. 177). In a further effort to get the Union to terminate its CAPCO agreement, the Respondents offered to increase the amount of the employee severance package to $3,000, and suggested that the Union let employees vote on this latest proposal. Finegan declined to put the matter to a membership vote, and instead stated that he would discuss the matter with Union president, Steve Hicks (Tr. 178). He explained to Respondents' negotiators that he had no intentions of terminating the 1997 collective bargaining agreement because the Union believed that CAPCO's employees still had rights under the contract at the new facility, insisted that the Union was entitled to recognition at the new facility, and that its agreement with Respondents still had two years to go before it would expire (Tr. 179).

On March, 11, 1998, Hancock faxed to Finegan a proposal entitled "Letter of Agreement" reiterating therein, among other things, the Respondents proposed $3,000 increase in severance package which had been proposed to the Union at the March 9, meeting, a preferential hiring plan, and a provision requiring the Union to terminate the collective bargaining agreement by March 31, 1998 (GCX-37, Tr. 211). In a letter to Haase dated March 16, 1998, Finegan rejected Hancock's offer, along with the further suggestion that the Union let employees vote on the Company's proposal, explaining that "[t]he Union is under no obligation, during the term of a contract, to hold a vote on an employer's proposal to make payment to individual employees in exchange for the termination of the collective bargaining agreement and the decertification of the union." Finegan advised Respondents in his letter that Hancock's proposal amounted to a violation of the Act and that the Union intended to file a charge on the matter. In his letter, Finegan again demanded that the Respondents comply with the Union's prior request for information. (GCX-4).

In apparent response to the employee preferential hiring discussion held at the March 9, meeting, and to the list given him that day by the Union, Haase on March 12, faxed to Finegan information on the attendance record of eleven CAPCO employees, including Bothwell, covering a six-month period (GCX-6). The cover letter states that because of the "inordinate amount of [work] time missed" by the employees listed, many of them would not be recommended for hire at AHT. As to Bothwell's chances for employment, Haase states in his letter that Bothwell's "attendance performance" shows that Bothwell "is consistently not available for work for various reasons," and that this factor would "probably preclude him from [being hired]."

In early April, according to Bothwell, Haase mentioned to him during one of several conversations the two had been having regarding CAPCO's closing that Bill Keough was "not going to let no Union come out to Wixom," referring to the AHT facility, and further told him that he, Bothwell, was on the wrong side of the fence regarding the Union, and that Bothwell was "wasting [his] talent, time on the Union side when [he] could spend it on the company side" (Tr. 428). Haase admits that he and Bothwell often spoke on a variety of matters, and admits to having said something to Bothwell about being on the wrong side of the fence, but claims he was simply relating his own personal experiences to Bothwell about how he, Bothwell, had at one point been a bargaining unit employee with some other employer and had "done pretty good" for himself by switching sides because he was able to make more money by becoming

part of management. (Tr. 90-91) While denying that he was referring to Bothwell being on the wrong side, Haase conceded that Bothwell could very well have construed his comments to mean that he, Bothwell, was on the wrong side of the fence by supporting the Union. Regarding his purported remark about Bill Keough not allowing a union at the AHT plant, Haase did not specifically deny having made such a statement, and testified only that he could not recall having done so (Tr. 86).[25] could not recall ever making such a statement to any employee and thus never specifically denied having made such a comment to Bothwell.

On or about May 12, 1998, Finegan and Bothwell met with Hancock and Haase at the CAPCO facility to discuss the Union's January 28, written request to reopen negotiations on wages and health insurance. The Respondents, according to Finegan, were of the view that the issue was somewhat moot presumably because of the pending closure of the facility, but did put an offer on the table. While at the facility, Finegan observed that the CAPCO plant was virtually empty, that items such as computers, files, etc. were all gone, and that equipment was being dismantled. The parties apparently failed to reach agreement on any of the wage or health insurance issues discussed during those talks.

Following the May talks, beginning sometime in early June, Finegan, at the suggestion of a Board agent, began efforts to contact CAPCO's 14-16 unit employees to determine their interest in obtaining employment with AHT. He testified that despite several attempts to contact all employees, he succeeded in talking to only about six to eight employees, all of whom expressed a willingness to work at AHT (Tr. 225).

On June 11, 1998, more than three months after Finegan requested information from Respondents, and eight days after CAPCO officially closed, the Respondents furnished the Union with the information requested (GCX-38). In the cover letter accompanying the information, the Respondents, inter alia, identified AHT's owners, and disclosed information regarding the machinery and equipment that AHT had leased or bought from CAPCO and other sources. The letter acknowledges that CAPCO closed on June 3, lists all employees that had been laid off or who would be receiving their last paycheck and severance agreement that same day, and noted that only one unit employee, Jameel Dabaneh, had actually applied for and been offered work at AHT, subject to successful completion of a drug test.[26] It further included a breakdown of the status of the remaining employees, e.g., the date the employee was laid off, terminated, or resigned, and the date the employee signed his severance package.

[25] Haase, it should be noted, did respond "No," when asked by Respondents' counsel if he ever told the Union during the 1997 and 1998 negotiations that "he couldn't give them rights at AHT." (Tr. 126). His response in this regard to a very general question regarding some unspecified rights hardly constitutes a refutation of Bothwell's assertion that Haase told him in April 1998 that the Union would not be allowed at AHT.

[26] The Respondents' statement in the letter that only Dabaneh applied for work was not entirely accurate for, as previously noted, during the parties' March 9, 1998, meeting, Bothwell informed Respondents of his interest in working at AHT. The Respondents also received from the Union at around the same time a letter signed by Bothwell, and employees Golden and Sharp, stating their interest in employment with AHT.

B. Discussion and findings

1. The Section 8(a)(1) allegations

The complaint alleges three specific instances of unlawful Section 8(a)(1) conduct (see GCX-1[f], par. 16). Thus, it alleges that in early February, 1998, the Respondents, through Small, unlawfully told employees that they did not want the Union at the AHT facility because they did not want to pay the wages they were paying at CAPCO, and that, in April 1998, the Respondents, through Haase, unlawfully told employees they would not permit the Union to represent employees at the AHT plant, and also solicited employees to abandon their support for the Union. I find merit in the allegations.

Support for the allegation regarding Small came from Bothwell who, as found above, credibly testified that Small told him that Bill Keough should be able to do what he wants with his property, that employees at AHT would not be getting paid what they were receiving at CAPCO because Respondents could readily obtain temporary workers to do the work, and that, regardless of the Union's efforts, there would be no union at AHT. The Respondents makes no claim that Small's statements were protected by the "free speech" proviso of Section 8(c) of the Act, and instead argues only that Bothwell should not be credited, an argument I have already rejected. Having found that Small made the remarks attributed to him by Bothwell, I further find the remarks to be coercive and violative of the Act. By telling Bothwell that the Respondents would not have a union at AHT no matter what the Union did, Small sent a clear message to Bothwell, and through him to other employees and the Union, that Respondents had no intentions of allowing employees at the AHT facility to be represented by the Union or, for that matter, any other labor organization regardless of their desires, and would in all likelihood not grant recognition to the Union even if lawfully required to do so. Small's comment in this regard, when viewed together with his further statement that the Respondents would not pay AHT employees what it had been paying at CAPCO and would instead hire temporary employees to do the work, strongly suggests that the Respondents' decision to shut down the CAPCO facility and to relocate said operations to the AHT plant in Wixom, Michigan was motivated, at least in part, by a desire to avoid paying the wage rates required by CAPCO's agreement with the Union. Through his remarks, Small conveyed to Bothwell and other employees that employment at AHT would be conditioned on their willingness to accept wages lower than what they had been receiving at CAPCO under the Union contract, and on their giving up their right to Union representation. In these circumstances, Small's comments were clearly coercive and violative of Section 8(a)(1) of the Act. *MetalSmith Recycling Company*, 329 NLRB No. 15 (1999).

As to Haase's remarks, Bothwell, as noted, claims Haase told him in early April 1998 that Respondents had no intentions of allowing the Union to represent employees at the AHT plant, and further told Bothwell he would be better off financially by switching sides from Union supporter to management supporter. I credit Bothwell and find that Haase indeed made the above remarks. Haase, in my view, was anything but credible both from a standpoint of his demeanor and from inconsistencies and improbabilities found in his testimony. Haase's initial denial, for example, of being a director of AHT, and admitting to it only when confronted with documentary evidence revealing otherwise, was, in my view, a deliberate prevarication, as it simply strains credulity to believe that Haase, a minority owner and president of AHT, would not have immediately known whether or not he also served on that company's board of directors. Haase, as noted, also denied at the outset having had the "union busting" conversation with Bothwell, and admitted to it again only when confronted with contrary assertions made in his own sworn affidavit to the Board. Accordingly, I give little credence to Haase's testimony.

Like Small's remarks to Bothwell just two months earlier, Haase's remarks clearly conveyed the message that efforts by the Union to seek representative status among employees at AHT, or by employees at that facility to obtain any such representation, would be an exercise in futility as the Respondents "would not let no Union come out to Wixom." I find nothing in Haase's remarks, as described by Bothwell, to indicate that Haase may have been conveying the possibility that the Respondents would not grant the Union voluntary recognition at AHT but would do so pursuant a Board election and certification. As Haase's remark contains no such qualification, it could reasonably have been interpreted by Bothwell to mean that the Respondents would never recognize the Union at AHT even if lawfully required to do so. Haase's remark in this regard, like Small's prior remark to Bothwell, violated Section 8(a)(1) of the Act. *MetalSmith Recycling Company*, supra.

Haase's further statement to Bothwell that he was on the wrong side of the fence, and that he could benefit financially by switching from the Union to the management side of the fence, could reasonably have been interpreted by Bothwell to mean that it was his support for the Union which was keeping him from obtaining employment at AHT, and that his chances for employment could improve if he turned his back on the Union and supported management. Thus, by telling Bothwell that the Union would never be allowed to represent employees at AHT, and by linking Bothwell's chances for success with Respondents to his giving up his support for the Union, the Respondents violated Section 8(a)(1) of the Act. See, e.g., *T & T Machine Co.*, 278 NLRB 970, 975 (1986); *Zero Corporation*, 262 NLRB 495, 498 (1982).

2. The Section 8(a)(5) allegations

(a) The alter ego issue and related refusal to bargain conduct

The complaint, as noted, alleges that CAPCO and AHT are alter egos and a single employer, and that the Respondents, by refusing to recognize the Union as the exclusive collective bargaining representative of its employees at the AHT facility, and refusing to apply the terms of CAPCO's 1997 collective bargaining agreement with the Union to employees at the AHT facility, has violated Section 8(a)(5) and (1) of the Act. I find merit in the allegations.

On the alter ego issue, the Respondents, as noted, admit, and the record in any event clearly establishes, that AHT and CAPCO are alter egos.[27] The Respondents, however, claim

[27] Thus, the facts herein, some of which were stipulated to by the Respondents at the start of the hearing in conjunction its alter ego admission, show that the criteria established by the Board for finding one employer to be the alter ego of another, to wit, substantially identical management, supervision, customers, operation, and equipment, see, e.g., *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984), are fully satisfied here with respect to AHT and CAPCO. As previously discussed, AHT has retained essentially the same management and supervisory teams formerly employed by CAPCO, is engaged in the same type of business, e.g., commercial heat treating, and uses the same type, albeit slightly more modernized, equipment previously used by CAPCO, some of which it acquired directly from CAPCO or through a lease arrangement with Cranbrook Investment (owned, as noted, by Bill Keough). While AHT has a smaller customer base, virtually all its customers are former CAPCO customers. (compare items 25 at GCXs-54[d] and 55[d]). Any difference between AHT and CAPCO in the size and nature of their respective operations does not, in my view, militate against an alter ego finding, particularly given the presence of other factors. *Marbro Co.*, 310 NLRB 1145, 1149 (1993).

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that notwithstanding its admission, AHT is under no obligation to recognize or bargain with the Union, or to accept the latter's labor contract with CAPCO, because the decision to relocate operations from CAPCO's Detroit location to AHT's Wixom facility was motivated by legitimate business and tax planning reasons, not by antiunion animus or to avoid CAPCO's labor obligations. I disagree, for the Board does not require that a showing of unlawful intent be made before an employer found to be the alter ego of another can be held liable for the predecessor's contractual obligations or unfair labor practices.

This is not to suggest that employer intent has no relevance in alter ego determinations, for the Board does consider employer motivation, along with the factors mentioned in fn. 26 supra, in determining whether or not an alter ego relationship has been created in the first place. *Advance Electric*, 268 NLRB 1001, 1002 (1984), citing to *Fugazy Continental Corp.*, supra. The Board, however, has held that none of these factors, taken alone, is the sina qua non of alter ego status, and that the absence of any one or more of these factors will not necessarily preclude a finding that an alter ego relationship has been established. *AAA Fire Sprinkler*, 322 NLRB 69, 77 (1996); *Sobeck Corp.*, supra at 266; *Market King, Inc.*, 282 NLRB 876 (1987). It has, in fact, found two business entities to be alter egos, and held the alter ego employer liable for the predecessor's contractual obligations and unfair labor practices, even when evidence of antiunion animus or of an intent to evade contractual obligations was neither apparent or shown to have been a factor in the creation of the alter ego. See, e.g., *Concourse Nursing Home*, 328 NLRB No. 91, slip op. at 10-11 (1999); *A & P Brush Mfg. Corp.*, 323 NLRB 303, 309 (1997); *Johnstown Corp.*, 313 NLRB 170, 171 (1993); *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994); *R.L. Reisinger Co.*, 312 NLRB 915, 917 (1993), enfd. (unpub.) 43 F.3d 1472 (6th Cir. 1994); *Honeycomb Plastics Corp.*, 304 NLRB 570, 573 (1991).[28] The fact that CAPCO may

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Further, as noted, when first formed in May 1997, and for a period of about seven months thereafter, AHT and CAPCO were both owned by AGI, which in turn was owned exclusively by Bill Keough and his two children. The Board has found substantially identical ownership where, as here, one company (AHT) was the wholly-owned subsidiary of the other company (AGI), and the stock of the latter (AGI) was concentrated in members of the same family. *Haley & Haley, Inc.*, 289 NLRB 649, 652 (1988). The fact that AHT was not fully operational in May 1997, and did not become so until sometime in 1998, does not preclude a finding that it was, as of May 1997, CAPCO's alter ego. *Hospital San Rafael*, 308 NLRB 605, 610 (1992). Likewise, the fact that AGI subsequently divested itself of ownership in AHT in January 1988 by transferring all of its AHT shares to the Keough children, Haase, and James would not preclude an alter ego finding for "alter ego status is to be determined based on the developments which took place at the time the alter ego was formed, not on what may have happened at a later date." *Redway Carriers*, 301 NLRB 1113, 1115 (1991). The Board in any event has held that ownership in different companies by members of the same family, as is the case here, constitutes substantially identical ownership sufficient to support a finding of alter ego status, and that identical membership is not mandatory for such a finding. *A&P Brush Mfg. Corp.*, 323 NLRB 303, 308 (1997); *D.I.C. Mfg. Co.*, 294 NLRB 426 (1989). Finally, the fact that both AHT and CAPCO utilized the same law firm and accounting firm to handle respectively their legal (including labor relations) and accounting matters, and that they maintain the same insurance and workman's compensation policies is strong evidence of a lack of arm's length dealing between the two companies and that an alter ego relationship indeed exists. *Sobeck Corp.*, 321 NLRB 259, 267 (1996).

[28] The U.S. Court of Appeals for the Sixth Circuit, which has jurisdiction over this matter, has endorsed the Board's view that employer intent, while a relevant factor to be considered when deciding alter ego questions, is not a prerequisite for such a finding. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1985); *Southward v. South Central Ready Mix Supply Corporation*,

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have had a legitimate business reason for a change in corporate organization therefore does not preclude a finding that an alter ego has been created. *Metalsmith Recycling Company*, supra. In sum, once an employer is found to be an alter ego of another, the labor obligations of the original employer are deemed to be shared by, and become that of, its alter ego regardless of the predecessor's motivation for creating the alter ego, and both will be held liable, as a single employer, for any violations of the Act. *Branch International Services*, 327 NLRB No. 50 (1998); *AAA Fire Sprinkler*, supra at 90; *The Sobeck Corporation*, supra at 266; *Auto Mechanics Lodge No. 1101 (La Rinconada Securities, Inc.)*, 289 NLRB 536, 538 (1989); *Volk & Huxley*, 280 NLRB 219, 226 (1986). Accordingly, Respondents' claim that CAPCO's alter ego, AHT, should not be compelled to assume CAPCO's bargaining or contractual obligations with the Union, or held liable for any unfair labor practices committed by CAPCO, because AHT purportedly was created for legitimate business reasons, is rejected as being without merit.[29]

The Respondents further argue that whatever recognitional or bargaining rights the Union may have been entitled to at AHT by virtue of the alter ego relationship between AHT and CAPCO were waived when it agreed to the plant closing agreement with CAPCO following the 1997 negotiations. They contend that during those negotiations, CAPCO fully disclosed "all material information relative to the planned closing of CAPCO and [their] opening of a new

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7 F.3d 487, 496 (6th Cir. 1993).

[29] The evidence of record in any event convinces me that AHT was indeed created, if not wholly at least in part, as a means of allowing CAPCO to escape its labor contract and bargaining obligations with the Union. Thus, the remarks made by Small and Haase to Bothwell, that Bill Keough would not allow the Union at AHT regardless of what the Union did, that he did not want the Union at AHT or to pay the type of wages at AHT he had been paying at CAPCO, coupled with the Respondents deliberate deception of the Union throughout the 1997 negotiations regarding CAPCO's intent to relocate and not close down operations, and as to the true relationship between CAPCO and AHT (see discussion infra), all lead to the inescapable conclusion that the Respondents were seeking to avoid their labor obligations. Support for this conclusion can also be found in the Respondents' proposal that CAPCO's unit employees could receive consideration for employment at AHT through placement on a preferential list only if the Union agreed to terminate its contract with CAPCO, and from the Respondents failure to comply with the Union's request for information, which the Union needed to confirm whether or not CAPCO and AHT were alter egos, until after CAPCO had closed down its Detroit facility and moved to Wixom. I am convinced that the Respondents delayed providing the Union with the information in the hope that it would keep the Union from learning of its deception until after the transfer of CAPCO to AHT was finalized and CAPCO had officially closed. Although the Respondents, as noted, claim that other factors, such as antiquated equipment, location in a high crime area, inability to expand operations, were what prompted the closing of CAPCO, no hard evidence, other than some testimony by Dine and Small, was produced to substantiate their claims in this regard. Neither Dine nor Small was, as previously found, particularly credible. While Finegan, Bothwell, and Hobson did make reference in their testimony to having heard some of these reasons cited during the 1997 negotiations as the justification for CAPCO's closing, their testimony reflects only what they were told, not what the true reason(s) might have been for the closing. Bill Keough, the person who apparently made all the decisions regarding the closing of CAPCO and opening of AHT, and who obviously would have been in the best position to explain what motivated him to close CAPCO, was not called to testify. Accordingly, I am not convinced that any of the reasons cited by the Respondents played a role in their decision to relocate CAPCO's operations to AHT's Wixom plant. However, if these factors were given some consideration, I remain convinced that the primary motivation behind the CAPCO closing was to allow CAPCO to escape its labor obligations.

company," engaged in "extensive" negotiations regarding this subject, and entered into the plant closing agreement acknowledging that CAPCO would "not be required to bargain any further on the issue of plant closing or its effect." (RB:23) I find no evidence of waiver here.

Initially, there is no disputing that a union may contractually waive a statutory bargaining right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962); also, *Amoco Chemical Company*, 328 NLRB No. 174 (1999); *Concourse Nursing Home*, 328 NLRB No. 91 (1999); *Georgia Power Company*, 325 NLRB No. 59 (1998). Waivers of statutory rights, however, will not be lightly inferred. Rather, the Board requires that a waiver be expressed in clear and unmistakable terms either through specific language in a contract, or by a showing that the matter sought to be waived was fully discussed and consciously explored during negotiations and that the union consciously yielded its interest in the matter. *Id*.

There is no question that at the very first bargaining session held February 27, 1997, the Respondents notified the Union of their intent to close down CAPCO and of their decision to open a new commercial heat treating facility. However, despite their claims to the contrary, I find that at no time during the parties' first meeting, or at any time prior to reaching full agreement with the Union on a new contract, did the Respondents reveal to the Union that CAPCO was, in fact, not closing down but was instead relocating operations to AHT, and that AHT in reality was to be nothing more than CAPCO's alter ego. I base my finding on Finegan's, Bothwell's, and Hobson's mutually corroborative and credible testimony that throughout the negotiations the Respondents' negotiators assured them that CAPCO was closing down and not relocating to AHT. In this regard, I reject as not credible Haase's claim that the Union was told CAPCO would be relocating to AHT, and that the parties agreed to a 30-day extension of their prior contract in order to continue bargaining over the "relocation" issue, as such testimony, as noted, is contradicted by other statements he made at the hearing which appear to bolster the above claims by Finegan, Bothwell, and Hobson.

Thus, while the relocation issue was the subject of some discussion during the 1997 negotiations, the record makes clear that those discussions amounted to nothing more than inquiries by the Union as to the Respondents true intentions regarding CAPCO and AHT, and centered on the Union's steadfast insistence that it expected to "follow the work" from CAPCO to AHT, and to maintain its representational rights at that facility, in the event CAPCO were to relocate to AHT and not close down completely. There is no credible evidence to suggest that at any time during those negotiations the Union withdrew its demand or gave up its right to be recognized at AHT, and to have the CAPCO contract made applicable at that facility in the event of a CAPCO relocation. Nor does the fact that the Union entered into a plant closing agreement support the Respondents' assertion that the Union waived its right to bargain over the relocation issue or to demand recognition on the basis of an alter ego connection between CAPCO and AHT, for the credible evidence of record, as well as Haase's own ambiguous testimony, makes clear that the Union did so based on the Respondents' false and misleading assurances that CAPCO was not relocating to Wixom and that AHT was a separate and new business entity unrelated to CAPCO.

The Respondents' conduct in concealing the true nature of the relationship between CAPCO and AHT during the 1997 negotiations, and in deliberately misleading the Union into believing that CAPCO was closing down completely and not relocating to Wixom, thus renders untenable their claim of a waiver by the Union of its right, arising from the CAPCO-AHT alter ego relationship, to represent employees at AHT and to have CAPCO's contract extended to AHT. The Board, quoting the Supreme Court's decision in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), has often pointed out that "good faith bargaining necessarily requires that claims made

by either bargainer should be honest claims." *Waymouth Farms*, 324 NLRB 960, 962 (1997), enfd. in relevant part, 172 F.3d 598 (8th Cir. 1999); *Strawsine Mfg. Co.*, 280 NLRB 553, 563 (1986).[30] In both *Waymouth* and *Strawsine*, the Board rejected employer claims of waiver by unions of a right to bargain over relocation decisions made by the employers on grounds that the latter, as the Respondents here have done, misrepresented their true intentions to the unions during negotiations. As in *Waymouth* and *Strawsine*, the Respondents' intentional misrepresentations and concealment of CAPCO's true plans, and of the relationship between CAPCO and AHT, effectively precludes a finding that any waiver by the Union has taken place with respect to its right to represent AHT's employees or to have its CAPCO contract made applicable to that facility. Accordingly, the Respondents' waiver defense is found to be without merit.[31]

As the evidence, and Respondents' admission, make clear that AHT is CAPCO's alter ego,

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[30] See, also, *O'Neill, Ltd.*, 288 NLRB 1354, 1355 (1988); *Conval-Ohio, Inc.*, 202 NLRB 85, 94 (1973); *Southern Materials Company, Inc.*, 198 NLRB 257, 258 (1972), enfd. 447 F.2d 15 (4th Cir. 1971).

[31] The Respondents on brief appear to be justifying their misrepresentations to the Union by suggesting that during the 1997 negotiations, the relationship between CAPCO and AHT was still somewhat fluid and uncertain, and, by implication, that the information provided to the Union during those negotiations as to the relationship between CAPCO and AHT was at the time accurate. By way of example, the Respondents argue on brief that "although CAPCO did not yet have any finalized plans and had not even settled on a location, it wanted to advise the Union of the closing and creation of a new company as soon as possible so that the parties could negotiate the effects of such a decision" (RB:3). They further note elsewhere in their brief that, "as is often the case when starting a new business, as time went by, there were some changes in the plans" and that "as more investigation and analysis was performed and more information gathered, CAPCO adjusted its plans accordingly." (RB:6-7). The Respondents' purported justification is without merit.

Thus, I find patently false the Respondents' claim that when the negotiations got under way they had not yet picked out a location for AHT. Finegan, as noted, credibly testified to having discussed with Respondents' negotiators at the first bargaining session the fact that a new facility was being built in Wixom, an assertion not denied by any of Respondents' witnesses, and to having received assurances that the building was part of a trust fund set up for the Keough children and not intended as a new CAPCO site. The Respondents' April 1998 position statement to the Board appears to bolster Finegan's testimony in this regard and to undercut the Respondents' above assertion that a location for AHT had not yet been chosen when negotiations got under way (GCX-12). Thus, the Respondents in their position statement claim that "[w]hen the Company began negotiations for the current contract…," e.g., February 1997, "[t]he Union was informed that some of the Company's owners would be joining with additional (new) owners to set up a separately incorporated company, Atmosphere Heat Treating, with a new facility and new equipment, and using a new treating process than the one used by Controlled Atmosphere," and that "the facility would be in Wixom, Michigan." The above language makes clear that the Respondents, as implied by Finegan's testimony, knew full well when they met with the Union in February 1997 just where AHT was to be situated. The Respondents' admission that "at all material times" CAPCO and AHT had been alter egos, and the representation by their attorney, Hancock, in his opening remarks that the Union knew from the very first proposal "that the company that would ultimately be created, Atmosphere Heat Treating, was a part of and related to the alter ego of CAPCO" (Tr. 24), establishes quite clearly that the Respondents knew from day one of the negotiations that CAPCO and AHT were to be alter egos, and lays bare any claim that their misrepresentations were not intentional.

and having found that the Union has not waived its right to represent employees at AHT or its right to have its collective bargaining agreement with CAPCO made applicable to AHT, it follows that AHT has, at all times since its inception on May 14, 1997, remained obligated to recognize and bargain with the Union and to adhere to the terms and conditions of employment contained in CAPCO's 1997 agreement with the Union. As CAPCO's alter ego, AHT also shares responsibility for the unfair labor practices committed by CAPCO. Thus, I find, as alleged in the complaint, that by refusing to apply the terms of its CAPCO agreement to AHT's employees and refusing to recognize the Union as the collective bargaining representative of said employees, the Respondents have violated Section 8(a)(5) and (1) of the Act. Both CAPCO and AHT thus shall be held liable, as a single employer, for remedying these and other violations found herein.[32]

(b) The Information Request

On March 6, 1998, the Union, as noted, requested certain information from Respondents pertaining to CAPCO and AHT. While the Respondents did provide the information to the Union, the record, as further noted, reflects that they did so some three months later, on June 11,1988, a fact not denied by the Respondents. The complaint alleges that Respondents' delay in furnishing the information to the Union amounted to a further violation of Section 8(a)(5) and (1) of the Act. I agree.

It is well-settled that an employer's duty to bargain in good faith includes an obligation to provide the union representing its employees with relevant information needed for the proper performance of its duties as a collective bargaining representative, unless the information being sought is of a confidential nature, in which case the Board will balance the union's need for the information against any legitimate and substantial confidentiality interest established by the employer. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).[33] The duty to

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[32] The fact that CAPCO may be now defunct or out of business does not preclude issuance of a remedial order against it. *Redway Carriers*, supra at 1115.

[33] The nature of the information being sought determines its relevancy. Thus, when a union's request pertains to employees in the bargaining unit and goes to the core of the employer-employee relationship, the information is deemed to be presumptively relevant. But when the information sought pertains to matters outside the bargaining unit, no such presumption applies and the burden is on the union to establish relevancy. *Magnet Coal*, 307 NLRB 444, 447-448 (1992); *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). Information needed by a union to establish the existence of an alter ego relationship falls into this latter category. A union seeking such information must establish its relevancy by showing that it had "an objective factual basis for believing that such a relationship existed." *Id.* In the instant case, the Union had good grounds for believing that AHT was nothing more than an alter ego of CAPCO when it made its March 6, information request. Thus, by then, the Union had received information from Respondents that most CAPCO management and nonunion personnel were to be employed by AHT, that certain CAPCO equipment and machinery was to be sold or leased to AHT, and that AHT, like CAPCO, would be engaged in the commercial heat treating business. Testimony by Bothwell indicates that shipments from CAPCO customers were also seen being diverted from CAPCO to the AHT facility, which would reasonably have suggested to the Union that AHT was taking over some of CAPCO's customers. Given these facts, I find that the Union has shown that it had a reasonable, objective basis for believing that CAPCO and AHT were indeed alter egos, and that the information requested was relevant and necessary for it to properly carry out it collective bargaining responsibilities. *Branch International Services,*

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supply information also includes the duty to do so in a timely fashion. *Devlieg-Sundstran*, 306 NLRB 867 (1992); *D.J. Electrical Contracting*, 303 NLRB 820 (1991); *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989); *EPE, Inc.*, 284 NLRB 191, 200 (1987).

The Respondents here have offered no viable or credible explanation for their three-month delay in furnishing the information to the Union. They do not, for example, contend that confidentiality concerns, the unavailability of the documents, or an inability to understand the nature of the request, prompted them to withhold the release of the information. Nor do they claim that the delay was caused by concerns regarding the relevancy of the information sought. Rather, as gleaned from their posthearing brief (p. 26), the only explanation offered by the Respondents is that when the Union made its request on March 6, 1998, it already knew that AHT "would be purchasing a minor portion of CAPCO's equipment" and that "many non-union employees were hired by AHT." Consequently, they contend that the documents the Union asked to see in its information request "contained no information that the Union did not already understand." In effect, the Respondents' argument is that the information they provided to the Union prior to March 6, 1998, was sufficient for the Union to ascertain the true relationship between CAPCO and AHT, and rendered the documents asked for by the Union in its March 6, 1998 request superfluous and unnecessary.

The Respondents' explanation is flawed in several respects. First, at no time following the March 6, 1998 request did the Respondents take the position with the Union that all the information outlined in the request had already been provided and that the Union therefore had no need for the information. Indeed, the converse appears to be true. Thus, Haase testified that when the information request was discussed at the March 9, 1998, meeting between the parties, someone, whom he did not identify, remarked that a lot of information was being sought, but that Respondents' negotiators agreed to furnish the Union with whatever it had requested (Tr. 121). Therefore, except for the minor comment regarding the amount of the information requested, there is nothing in Haase's testimony to suggest that the Respondents ever objected to providing the information based on what it may have previously disclosed to the Union.

Further, the March 6, 1998 information request was not limited to information regarding the ownership of AHT, or what equipment and which non-union employees might have been transferred to that facility, but rather sought other information relevant to a proper determination of whether or not an alter ego had been established and whether CAPCO was in violation of Article III of its contract (see fn. 21 supra). The Respondents do not contend that all such information was provided to the Union prior to March 6, 1998, and indeed the fact that the Respondents furnished additional information on June 11, 1998 makes clear that the Respondents, contrary to their suggestions on brief, had not provided the Union with all the information asked for in the March 6, 1998, request prior to that date. Further, the Union was under no obligation to accept this partial disclosure of information as compliance with its request and was entitled to demand full disclosure of the information, as indeed it did. *WCCO Radio, Inc.*, 282 NLRB 1199, 1202 (1987).[34] Nor was the Union required to accept as true the verbal

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Inc., 327 NLRB No. 50 (1998); *Magnet Coal, Inc.*, 307 NLRB 444, 448 (1992).

[34] The Respondents further suggest that the information requested could not have been too important to the Union because it only made one formal request for the information in March 1998. The record reveals otherwise. Thus, on March 16, 1998, ten days after making its initial request, the Union renewed its request (GCX-4), and on June 1, 1998, it again made a written request for the information (see, GCX-4, GCX-9). Finegan also credibly testified that "there may have been a couple of phone calls" made to the Respondents asking for the information before

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representations the Respondents may have made to it during the 1998 meetings held prior to the March 6, 1998 information request regarding AHT's ownership, or the equipment and number or type of employees transferred to that facility. Rather, the Union, particularly in light of the Respondents' repeated and false denials of any nexus between CAPCO and AHT, was entitled to conduct its own investigation and reach its own conclusions as to the true relationship between CAPCO and AHT. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994); *Reiss Viking*, 312 NLRB 622, 625 (1993); *Pertec Computer*, 284 NLRB 810, 811 at fn. 5 (1987). Accordingly, for the above-stated reasons, the Respondents' explanation on brief for its three-month delay in complying with the Union's March 6, 1998, information request is found to be without merit. I therefore find, as alleged in the complaint, that said delay was unreasonable and unjustified and violative of Section 8(a)(5) and (1) of the Act.

3. The Section 8(a)(3) allegation

Finally, the complaint alleges that the Respondents violated Section 8(a)(3) and (1) by refusing to offer employment to CAPCO's unit employees at their AHT facility, and refusing to apply the collective bargaining agreement between CAPCO and the Union to AHT's employees. A finding that an employer's decision or action discriminated against employees in violation of Section 8(a)(3) generally requires a showing that antiunion animus was a motivating factor in that decision. The record here provides ample evidence of the Respondents' antiunion animus. Thus, their unlawful creation of AHT as an alter ego to evade CAPCO's collective bargaining obligations provides strong evidence of the Respondents' antiunion animus, *Branch International Services*, 327 NLRB No. 50, slip op. at 11 (1998), as do the unlawful remarks made by them through Haase and Small to Bothwell that the Respondents would never allow the Union at AHT, and its requirement that the Union terminate its CAPCO contract in order for employees to be placed on a preferential hiring list. By their latter conduct, the Respondents effectively conditioned employment by CAPCO's unit employees at AHT on their agreement to work under noncontract terms, and thereby discriminated against employees solely because of their Union membership in violation of Section 8(a)(3) and (1) of the Act. See, *Hydro Logistics*, 287 NLRB 602, 603 (1987); also, *O'Neill, Ltd.*, 288 NLRB 1354, 1383 (1988).

Conclusions of Law

1. The Respondents CAPCO and AHT are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. CAPCO and AHT are alter egos of each other and a single employer.

4. All operators, maintenance helpers, truck drivers and hi-lo drivers employed by CAPCO and by its alter ego AHT at the Wixom, Michigan facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

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the request was renewed in writing (Tr. 292). The Respondents, in any event, were not free to ignore the request because it may not have been renewed after March 6, 1998, for an employer's statutory obligation with respect to a request for relevant information is to comply with the request. It may not simply sit back and wait for the union to make repeated requests before deciding to comply. *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 109 (1996).

5. By refusing to apply the terms of the collective bargaining agreement entered into between CAPCO and the Union on April 14, 1997 to unit employees employed by AHT at the Wixom facility, by refusing to recognize the Union as the exclusive collective bargaining representative of AHT's employees, and by its unreasonable delay in complying with the Union's request for relevant information, the Respondents have violated Section 8(a)(5) and (1) of the Act.

6. By refusing to offer CAPCO unit employees employment at AHT under the terms and conditions contained in its collective bargaining agreement with the Union, and refusing to apply the terms of that agreement to AHT employees, the Respondents have violated Section 8(a)(3) and (1) of the Act.

7. By telling employees that it would never allow a union to represent employees at AHT, that it did not want the Union at AHT because it did not want to pay the wages it was paying CAPCO employees, and encouraging an employee to abandon his support for the Union, the Respondents have violated Section 8(a)(1) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondents shall be ordered to recognize and, on request, to bargain with the Union as the exclusive collective bargaining representative of unit employees employed at AHT's Wixom, Michigan facility, and to apply and adhere to the terms and conditions of employment contained in the 1997-2000 collective bargaining agreement entered into between CAPCO and the Union, to unit employees employed at the Wixom facility. The Respondents will also be required, within 14 days of the Order in this case, to offer all former CAPCO unit employees who were employed by CAPCO during the period December 1997, employment at AHT's Wixom, Michigan facility at the same wage rate and other terms and conditions of employment contained in the CAPCO collective bargaining agreement.[35] Finally, the Respondent's shall make said employees whole for any loss of wages and benefits resulting from their failure to offer employment to unit employees as prescribed in *Ogle Protection Service*,183 NLRB 682 (1970), with interest on such amounts to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[36]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

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[35] As the Respondents began accepting job applications and offering employment at AHT in December 1997, and as the CAPCO facility apparently closed down on June 3, 1998, the General Counsel on brief has proposed, and I agree, that offers of employment should be made only to those CAPCO unit employees who were employed during that time period.

[36] Article XV of the parties' collective bargaining agreement makes reference to a Health and Welfare Fund. Because the provisions of such benefit fund agreements are variable and complex, the Board does not provide at this stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund contributions. Any additional amounts owed are to be determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216, fn. 7 (1979).

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and

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ORDER

The Respondents, Controlled Atmosphere Processing, Inc., Detroit, Michigan, and Atmosphere Heat Treating, Inc., Wixom, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to apply and adhere to the terms and conditions of employment of their collective bargaining agreement with Local 283, International Brotherhood of Teamsters, AFL-CIO, at Atmosphere Heat Treating, Inc.'s Wixom, Michigan facility, and refusing to recognize and bargain with the above Union as the exclusive collective bargaining representative of their employees in the following appropriate unit:

> All operators, maintenance helpers, truck drivers, and hi-lo drivers employed by Controlled Atmosphere Processing, Inc., at its Detroit, Michigan facility, and by Atmosphere Heat Treating, Inc., at its Wixom, Michigan facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Delaying compliance with the Union's request for relevant and necessary information that the Union needs to perform its duties as the exclusive bargaining representative of their employees.

(c) Telling employees that they do not want the Union at Atmosphere Heat Treating, Inc.'s Wixom facility because they do not want to pay the wages that were being paid unit employees by Controlled Atmosphere Processing, Inc., that they will not permit the Union to represent employees at Atmosphere Heat Treating, Inc.'s Wixom facility, and soliciting employees to abandon their support for the Union.

(d) Failing and refusing to offer employment at Atmosphere Heat Treating, Inc. to former employees of Controlled Atmosphere Processing, Inc. under the terms of their collective bargaining agreement with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Apply and adhere to the terms and conditions of employment contained in their collective bargaining agreement with the Union to Atmosphere Heat Treating, Inc.'s Wixom, Michigan facility, and recognize and, on request, bargain with the Union which is the exclusive collective bargaining representative of the above-described unit of employees at Atmosphere Heating Treating, Inc.'s Wixom, Michigan facility, and Controlled Atmosphere Processing, Inc.'s Detroit, Michigan facility.

(b) Within 14 days from the date of this Order, offer former bargaining unit employees

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Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

who were employed by Controlled Atmosphere, Inc at its Detroit, Michigan facility during the period December 1997 through June 1998, employment at Atmosphere Heat Treating, Inc.'s Wixom, Michigan facility on the same terms and conditions of employment they were receiving while employed by Controlled Atmosphere Processing, Inc.

(c) Make said employees whole for any loss of wages or other benefits they may have suffered as a result of Respondents' failure to offer them employment at Atmosphere Heat Treating, Inc., with interest as set forth in the Remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facilities in Detroit and Wixom, Michigan copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since .

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
George Alemán
Administrative Law Judge

[38] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to give effect to or apply the terms of the collective bargaining agreement entered into between Controlled Atmosphere Processing, Inc. and Local 283, International Brotherhood of Teamsters, AFL-CIO, which is the exclusive collective bargaining representative of our employees in the unit described below, to employees employed by Atmosphere Heat Treating, Inc. at its Wixom, Michigan facility, **WE WILL NOT** refuse to grant recognition to and bargain with said Union at Atmosphere Heat Treating, Inc.'s Wixom facility, and **WE WILL NOT** unreasonably delay providing the Union with relevant and necessary information. The appropriate unit includes:

> All operators, maintenance helpers, truck drivers, and hi-lo drivers employed by Controlled Atmosphere Processing, Inc., at its Detroit, Michigan facility, and by Atmosphere Heat Treating, Inc., at its Wixom, Michigan facility; excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to offer employment at Atmosphere Heat Treating, Inc.'s Wixom facility to bargaining unit employees who were formerly employed by Controlled Atmosphere Processing, Inc. at its Detroit, Michigan facility under the terms and conditions contained in our collective bargaining agreement with the Union.

WE WILL NOT tell employees that we do not want the Union representing employees at Atmosphere Heat Treating, Inc. because we do not want to pay the wages that were being paid to unit employees by Controlled Atmosphere Processing, Inc., **WE WILL NOT** tell employees that the Union will not be permitted to represent employees at Atmosphere Heat Treating, Inc., and **WE WILL NOT** solicit employees to abandon their support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL give effect to and apply the terms of our collective bargaining agreement to unit employees employed by Atmosphere Heat Treating, Inc. in Wixom, Michigan, and **WE WILL** recognize and, on request, bargain with the Union as the exclusive collective bargaining representative of our employees in the above-described appropriate bargaining unit.

WE WILL, within 14 days of this Order, offer employment at Atmosphere Heat Treating, Inc. to unit employees who were formerly employed by Controlled Atmosphere Processing, Inc. during the period December 1997 to June 1998 under the terms and conditions set forth in our collective bargaining agreement with the Union.

WE WILL make said employees whole for any loss of wages or other benefits they may have sustained as a result of our refusal to offer them employment at Atmosphere Heat Treating, Inc., with interest.

CONTROLLED ATMOSPHERE PROCESSING, INC. and ATMOSPHERE HEAT TREATING, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226–2569, Telephone 313–226–3244.